with him. There was no evidence of the residence of the fifth who would be the last son, if the adopted son was included in the count. The tenant further alleged that one of his sons was married and his wife and their children lived with him. There is no allegation that this married son who could only be the eldest son, lived with the tenant and in the absence of such evidence, or of any explanation, it must be taken as another falsehood. Who lived with the tenant at the premises in dispute was not clear on the evidence, but his evidence was led by experienced counsel. A court in an assessment of the evidence must necessarily pay regard to the words used in their ordinary meanings and if no allegation was made by *X* who wants the court to believe that *Y* resided with him, then it must be taken that *Y* did not reside with *X*. From the evidence, if the tenant was to be believed, it would appear that the tenant had residing with him his two wives, and two sons Ganesan and Krishnan, and of these two Krishnan was entitled to municipal quarters.

It was, as I have said, not clear in evidence whether the eldest son lived with him. Not one word was said. All that was led in evidence was that he was doing business as an agent of Singer Sewing Machine Co. Ltd., on the premises but as pointed out by the learned president to counsel for the landlord during the cross-examination of the tenant, there was no allegation in the pleadings that the tenant or his son was carrying on business on the premises as a ground for resisting the application, despite the fact that when the action was commenced, if not when the notice of 4th March 1965 was served, the tenant, if he was to be believed, had already allowed his eldest son to conduct his business on the premises. It therefore appears to me that the learned president was right to ignore this allegation in his assessment of hardship, but if he was wrong, I do not think that it was of any great relevance. Agencies for Singer Sewing Machine Co. Ltd., are dotted all over the country and extend even to remote kampongs. Their success depended not on a strategic location but on the need of almost every family in the land for a sewing machine. It is also in evidence that previous to the son's business, the tenant had let out the ground floor to a Chinese laundry man who left in 1965. Even if the tenant was to be believed that he did not put his son in place of the laundry man purposefully to defeat the application of the landlord, the point is that the whole of this evidence clearly established that the tenant did not need the accommodation of the entire premises for his living and such of his family as resided with him, and that there would be no hardship in the son removing his agency to another premises in the locality.

It is in evidence that the landlord had offered to arrange with his own landlord for the exchange of premises with the tenant. This offer was rejected by the tenant on the ground that it was not suitable. It is also in evidence that the landlord had also offered by way of alternative accommodation one or two of his houses in Silibin Lane, each with two rooms, which were then vacant. This offer was also turned down. The attitude of the tenant can only be described, if one is inclined to be charitable, as that of a dog in the manger and his counsel had openly and quite rightly not sought to throw any moral mantle over him. The evidence however suggested that the tenant's resistance was for the purpose of exacting 'tea-money'.

As for the landlord, he alleged that he required the premises in Connolly Road, Ipoh, for his moneylending business. Any premises in a side road such as Jelf Road or Silibin Lane would not give the security which premises on a major road such as Connolly Road could give, and which the business requires. The question of installing modern sanitation was only a side issue, but in all the circumstances the learned president found that the application by the landlord was a genuine one.

Now all this evidence was before the learned president. He had the advantage of seeing and hearing the witnesses. He had the further advantage of visiting the premises and the locality. He had come to certain findings of fact and inferences drawn from the facts he had found. On the whole of the evidence he had come to the conclusion that greater hardship would be inflicted by refusing to grant the order than by granting it. I am unable to see nor has it been demonstrated to me that on the evidence before him, and in all the circumstances of the case, he could not come to his findings of fact or how his inferences were wrongly drawn. Neither has it been shown to me that his very careful reasoning and consideration of the relevant authorities were wrong.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Dharmananda & Co.; Arulanandom & Co.*

SUBBIAH SUNDARAVALLI ACHI v. KARUPPIAH CHETTIAR & ANOR.

[O.C.J. (Chang Min Tat J.) June 17, 1968]
[Ipoh — Originating Summons No. 149 of 1968]

Wills — Testator disposing of properties to widow during life time — Whether resulting trust created — Presumption of advancement — Evidence in rebuttal.

Executors and Trustees — Testamentary remuneration — Whether trustees entitled to salary for running business on behalf of testator's estate.

The applicant was the younger of the two widows of the testator and one of the beneficiaries of his estate.

By his will dated December 12, 1963 the testator appointed the respondents the executors and trustees of his will. The testator died on January 4, 1964 without having revoked or altered his will and probate was duly granted to his executors. In the list of assets of the testator the executors included 4 piece of lands which were registered in the name of the applicant. It was clear that these pieces of lands were originally bought by the testator and he subsequently in 1954 registered them in the name of the applicant. It was however not clear as to what was the consideration for the transfer of the said lands.

The respondents claimed that the four pieces of lands belonged to the estate. The basis of their claim was a reference in the recital to the testator's will to the immovable properties in Malaysia and they contended that as the testator had no other immovable properties in Malaysia, it necessarily followed that the lands registered in the name of the applicant were the lands belonging to the estate.

The second question for consideration was whether the respondents as trustees were entitled to receive any sum in excess of the authorised remuneration of 1,500 rupees mentioned in the will. It was common ground that the first respondent was an employee of the testator during his lifetime and it was contended that in continuing to manage the testator's estate he was an employee of the testator's estate and therefore entitled to further remuneration.

Held: (1) on the evidence that was before the court it was not open to the respondents to deny that the testator sold the lands in question to the applicant or that the applicant had acquired them for valuable consideration;

(2) if the court was wrong, and presuming that the respondents had shown on the balance of probabilities that the applicant had given no valuable consideration, then the applicant must be taken to hold the lands not on a resulting trust for the testator's estate but beneficially on the equitable presumption of advancement — the respondents not having produced any evidence in rebuttal;

(3) the first and second respondents were not entitled to receive any remuneration other than the testamentary one of 1,500 rupees and all moneys taken in excess of the testamentary remuneration would have to be repaid by the respondents to the estate.

Case referred to:—

(1) *Robinson* v. *Pett* 24 E.R. 1049.

ORIGINATING SUMMONS.

Abdul Rahim Noor for the applicant.

F. C. Arulanandom for the respondents.

Cur. Adv. Vult.

Chang Min Tat J.: This is an application to determine (1) whether the lands held under E.M.R. Nos. 266, 298, 490 and 491 for Lot Nos. 420, 387, 388 and 353 in the Mukim of Kamunting registered in the name of the applicant belong to her, the applicant, and (2) whether the respondents who are the trustees under the will of the testator are entitled to receive any sum in excess of the authorised remuneration of rupees 1,500 per annum given under the will.

The applicant is the younger of the two widows of the testator and one of the beneficiaries of his estate. By his will made on 10th December 1963 the testator appointed the respondents the executors of his will. He died on 4th January 1964 without having revoked or altered his will. The executors were duly granted probate. In the list of the assets of the testator, they had included the said four pieces of lands. The pieces of lands stand registered in the name of the applicant. It would appear that these pieces of lands were bought by the testator and originally registered in his name before being subsequently, sometime in 1954, registered in the name of the applicant, his second wife. This was the allegation of the respondents. The applicant had not refuted this allegation nor advanced any explanation how the lands became registered in her name. I must accept therefore as proved or agreed that the lands were transferred by the testator to the applicant.

What the consideration for the transfer was I was also not told. Was it for the love and affection the testator bore to his second wife, the applicant, or was it for valuable consideration in the sense of money paid and received? The relevant transfer forms had not been shown to me and the consideration stated therein was not made known to me. However, the respondent fairly admitted in their affidavit in reply that according to the account books of the testator in his firm, E.M.R. Nos. 480 and 491 were recorded as having been purchased from the testator for $1,717.50 and E.M.R. Nos. 266 and 298 for $8,000. The account books apparently did not show to whom the lands were sold and from whom the money was received but the dates of the entries were about the times when the lands were transferred to the applicant. However, the respondents did not feel justified in making nor did they make any claim that such money had, in fact, not been paid.

Now the titles to the lands are registered in the name of the applicant and the burden of defeating her title by proving that she holds at all times the said lands on a resulting trust for the testator and after his death for his estate lies clearly on the respondents. What they had done so far was merely to claim that the lands belonged to the estate. They were moved to make this claim by the instructions of the testator's first wife and founded their claim on a portion of the will.

This portion was a recital in the will and reads as follows:—

"Whereas I am possessed of properties in India, namely, rice mills, shares in the joint-stock companies, government documents (or Government Loan Bonds), wet and dry lands (or agricultural lands), houses, vacant land (or ground set apart for building) and the debts due to me. The insurance policies are in my name. I have movable and immovable properties and shares in Malaysia. Other than these, the immovable properties in Malaysia and the life insurance policies that are in India which are still in the name of my younger wife (or my second wife) Suntharavalli Achi (or Sundara-

valli Achi). The properties hereinbefore mentioned and the life insurance policies which are being bought and paid from my assets with absolute ownership rights and debited accordingly into my accounts."

There is no other reference in the will to the lands, and the lands if they belong to the estate fall into residue. It was the contention of the respondents that the testator's claim of ownership in his will together with the admitted fact that at the time of his will and his death the testator was not registered as the proprietor of any land in Malaysia must necessarily establish that the lands in dispute still belonged to his estate. No other argument was advanced and no other evidence adduced.

I am unable to agree with this contention. It seems to me that the respondents are faced with two obstacles neither of which they have been able to surmount. In the first place, there was the evidence in the account books of payments for the lands, payments which it must be observed were credited into the testator's account. As against this, the reference in the recital quoted above in the testator's will was to purchases debited against the testator's account. In the face of this evidence and in the absence of any other evidence, I do not think it is now open to the respondents to deny that the testator had sold the lands or that the applicant had acquired them for the valuable consideration as stated. The entries in the account books are in my mind not only relevant under section 32 and section 34 of the Evidence Ordinance but also, having regard to the fact that they are kept by the testator at his firm in the ordinary course of his business, as admissions made against his pecuniary or proprietary interest which might well operate as estoppels.

If I am wrong and presuming that the respondents had shown on a balance of probabilities that the applicant had given no valuable consideration for the lands (of this there is not the slightest proof), then the applicant must be taken to hold the lands not on a resulting trust for the testator, her husband, but beneficially on the equitable presumption of advancement. This presumption is of course rebuttable, but I do not think that a subsequent averment in the recital to his will made some 10 years after the transfer and shortly before his death can be said, *per se*, to have rebutted the presumption. If the testator had desired to retain the beneficial interest in the lands, he could have obtained from the applicant a declaration of trust. This he had not done. In the result, his executors had not been able to produce any evidence in rebutial. The respondents had not therefore discharged the burden of proof on them.

I must therefore hold that the applicant stands possessed of the said lands beneficially and freed from any trust for the estate of the testator.

On the second question for determination, it is common ground that the first respondent was in the lifetime of the testator a manager of the testator's business at Taiping and Parit Buntar at a salary of $180 p.m. and an annual bonus of $1,500 and that he continued to draw this salary and bonus (in addition to the executors' remuneration of rupees 1,500 provided in the will which he shared with the second respondent) after the death of the testator on the basis that in continuing to manage the testator's business at Taiping and Parit Buntar, he continued to be an employee of the testator's estate. The respondents had also employed one Verapaan Chettiar at a salary of $60 p.m. and a bonus of $400 per annum from the funds of the estate. The respondents however allege that this Verapaan Chettiar was a clerk employed in the testator's lifetime at the same pay and bonus and that his services were necessary.

Now the general rule is that a trustee cannot make a profit from his trust and it follows that trustees and executors are generally entitled to no allowance for their time and trouble. (See *Robinson* v. *Pett* [1]). In the absence of any provisions in the will, apart from the executors' remuneration, and in the absence of any agreement with the beneficiaries and without there being any order of court or statutory provisions allowing or justifying the continuance of the remuneration drawn by the 1st respondent *qua* employee, he must now be ordered to refund what he had drawn in excess of his testamentary allowance. It may be harsh on him but if the testator had desired to give him a greater remuneration, he would not have fixed the sum. Since he had done so, he must have considered it to be sufficient and proper remuneration for his executors. If his executors did not agree they were entitled to decline the trust but having accepted it, they must be taken to have agreed to do so at the remuneration offered.

As for Verapaan Chettiar's salary and bonus, the will is silent on the powers of the executors to employ others but it is obvious that his services were necessary to the running of the testator's moneylending business. The respondents should have come to court for directions, but despite their failure, I consider that in all the circumstances of the case, I should and I do authorise the employment of Verapaan Chettiar at his present emoluments.

There will therefore be a declaration that the applicant stands possessed of the said lands beneficially and absolutely freed from any resulting trust in favour of the estate of the testator and an order that the respondents as executors do exclude the said lands from the estate of the deceased. There will also be a further order that the 1st and 2nd respondents are not entitled to receive any remuneration other than the testamentary one of rupees 1,500

per annum and that the 1st respondent do repay to the estate all moneys taken in excess of the testamentary remuneration. There will also be an order that the respondents are empowered to retain the services of Verapaan Chettiar at his present emoluments.

Costs of both parties on a solicitor and client basis to be taxed and paid from the estate of the testator.

Order accordingly.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Arulanandom & Co.*

SENG HIN v. ARATHOON SONS LTD.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Winslow J.) July 9, 1968]

[Singapore — Federal Court Civil Appeal No. Y58 of 1967]

Sale of Goods — Merchantable quality — Proof of — Sale of Goods Act, 1893, s. 14(1) & (2).

This was an appeal against the decision of the High Court which had awarded the plaintiffs the sum of $2,369.90 as damages for breach of contract in respect of the sale by the defendants to the plaintiffs of tapioca flour. On appeal it was argued that the plaintiffs had not, on the facts discharged the onus of proving that the goods were of unmerchantable quality. The evidence showed that a portion of the flour had been discoloured. The sacks in which the tapioca was kept had been painted with Chinese letters in red ink and this red ink had penetrated the jute cover with the result that some of the tapioca flour was discoloured. As a result the flour (which was to be delivered to a German firm) was declared under the German regulations to be unfit for human consumption. There was no evidence that the part of the flour which was said to be contaminated by the red colour was insanitary or contained any deleterious ingredient.

Held, allowing the appeal: (1) in order to show that the goods were not of a merchantable quality it had to be shown that the goods were of no use for any purpose for which such goods would normally be used and were therefore not saleable under that description;

(2) in this case the plaintiffs had failed to show that the tapioca flour was of unmerchantable quality under English law, as although the flour may not have been in perfect condition it was on the evidence at least unsaleable as starch; nor had it been satisfactorily found that it was unfit for human consumption under the law of Singapore;

(3) the learned trial judge had erred in law in deciding that the tapioca flour was not of a merchantable quality.

Cases referred to:—

(1) *Cammell Laird & Co.* v. *The Manganese Bronze And Brass Co.* [1934] A.C. 402 at p. 430.

(2) *Bradley & Sons Ltd.* v. *Colonial Continental Trading Ltd.* [1964] 2 Lloyd's Rep. 52 at p. 62.

(3) *Bartlett* v. *Sidney Marcus Ltd.* [1965] 1 W.L.R. 1013 at p. 1016.

FEDERAL COURT.

David Marshall (*K. C. Chan* with him) for the appellants.

J. F. McWilliam for the respondents.

Cur. Adv. Vult.

Winslow J. (delivering judgment of the court): At the conclusion of the hearing we allowed the appeal by the defendants against the judgment of Ambrose J. awarding the plaintiffs the sum of $2,369.90 as damages for breach of contract in respect of the sale by the defendants to the plaintiffs of 10 tons of "Gold Medal" tapioca flour. We now give our reasons.

By Contract No. 2971 dated 6th February, 1963 the defendants sold the aforesaid tapioca flour under its trade name to the plaintiffs at $16.25 per picul ex store packed in bags for shipment in February. The defendants did not know to which part of the globe the goods were to be shipped or for what purpose the said flour was required.

The plaintiffs took delivery of and shipped the bags in question on 16th February, 1963 for discharge at Rotterdam for account of Messrs. Jan Bosscher of Harengroningen. Prior to delivery, the defendants had marked these bags on both sides with their own distinguishing mark consisting of Chinese lettering in red ink using a red dye on stencil on the outer cover of the jute bags as had been their usual practice in the course of their tapioca flour business during the preceding 17 years. It should also be noted that during the preceding 8 years the plaintiffs had purchased the same brand of tapioca flour from the defendant on 5 occasions and sold it to Messrs. Jan Bosscher without complaint.

After arrival of the flour in Holland a survey was conducted on 29th April, 1963 by one, Helmut Tillery, a sworn surveyor from Bremen. He was examined upon oath before the Municipal Court of Bremen in West Germany in early 1967, pursuant to a letter of request, and his deposition was to the following effect. He inspected the outward condition of 50 out of 100 sacks of the tapioca flour concerned and saw the Chinese letters placed by the defendants in red painting on both sides, the painting being put on thicker on one side. He opened about 10 to 15 sacks and found that the red colour had penetrated the jute cover and that granules of the colour were lying on the tapioca flour. Besides, the flour was slightly discoloured. In such cases, the coloured particles were only to be found within the reach of the Chinese lettering and that was where the flour was discoloured. From 3 to 5 sacks he took samples and pieces of the sacking with the red colour on it which he sent for analysis to Dr. Werner Hofmann, of Bremen, a certified food chemist and bacteriologist as well as a qualified analytical chemist. According to